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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE: EX PARTE APPLICATION OF THE FEDERAL REPUBLIC OF NIGERIA AND ABUBAKAR MALAMI, THE ATTORNEY GENERAL OF THE FEDERAL REPUBLIC OF NIGERIA

20 MC 169 (LGS)

REMOTE TELECONFERENCE

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New York, N.Y.
July 9, 2020
10:35 a.m.

Before:

HON. LORNA G. SCHOFIELD,

District Judge

APPEARANCES

MEISTER SEELIG & FEIN
Attorneys for Applicants
BY: CHRISTOPHER J. MAJOR
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(Remote teleconference)

THE COURT: Good morning.

(Case called)

THE DEPUTY CLERK: Before we begin, I'd like to remind the parties of several rules and restrictions that are in effect due to the novel coronavirus.

First, while members of the public and press have presumptive access to this proceeding, recording or broadcasting of this proceeding is still prohibited. Violation of these prohibitions may result in sanctions.

Secondly, as we have a court reporter present today, I'm going to ask counsel to please state your name before you speak, each time you speak.

We are here before The Honorable Lorna G. Schofield.

THE COURT: So good morning again, everyone. Thank you for convening in this way.

We are here on an application by Process and Industrial Developments Limited, which has been deemed an interested party in this action. And I've reviewed your letter of June 24th, 2020. I've also reviewed the applicant's response dated June 30, 2020.

I have the appearance sheet from Mr. Street, but I was wondering who's going to be speaking on behalf of the interested party?

MR. KLAZEN: Good morning, your Honor.

My name is Joseph Klazen. I'm a partner with Kobre & Kim, and I will be speaking on behalf of the interested party.

And I have my associate Darryl Stein on the line as well.

THE COURT: Okay. Thank you. Welcome, Mr. Stein.

And who's going to be speaking for the applicant?

MR. MAJOR: Good morning, your Honor.

Chris Major, on behalf of the applicants.

THE COURT: Okay. Great. Thank you.

So this is actually an application by the interested party. As I said, I've read both the letters. I'll hear whatever you have to say briefly.

Let me just preface it by telling you what my thinking is.

I didn't see citations to any law in the application. And this seems like an unprecedented situation to me, where a party who is not the producing party, nor the requesting party, is asking for some intervention or relief as to documents that have already been produced. So based on that, I'm inclined not to grant the application. And if such relief has been granted before, I'd be interested in knowing about it and knowing the circumstances.

So Mr. Klazen.

MR. KLAZEN: Yes. Thank you, your Honor.

So as your Honor mentioned, our client, which I'll

refer to as "P&ID," since it's a little shorter than the full name, was recognized by your Honor as an interested party in this proceeding. And that was a correct finding because P&ID is, in fact, the target of Nigeria's investigations and prosecutions in this case.

I won't go over the whole history, but essentially, as we put it in our letter, P&ID obtained an arbitration award against Nigeria, which Nigeria is now seeking to undermine through a criminal investigation, and then also an application to set aside the award in the UK.

So our client has an interest not only in the proceedings generally, but also in how Nigeria is actually using the discovery that it's getting, because all of the discovery is being used against our client.

So this is not a situation where we are asserting, you know, the rights of other parties or interested parties; this is a situation where our client has an interest in making sure that Nigeria adheres to the limitations of the discovery order that your Honor granted based on the application that it filed.

THE COURT: Could I ask a question? Sorry to interrupt you. And it's a little bit more awkward interrupting when we are meeting remotely like this.

MR. KLAZEN: Not a problem.

THE COURT: I guess one of the things I was wondering is I understand that P&ID is the target or subject of the

criminal investigation that Nigeria is undertaking, and that that was the purpose for the request, and you're objecting because they are using documents elsewhere.

But in terms of the documents that they actually got from one of the banks -- I think it was HSBC -- were those P&ID account records or were they third-party account records or what exactly are these documents?

MR. KLAZEN: So, your Honor, the subpoenas included many different requests. But the ones that are sort of the subject of the out-of-scope issue that we have raised relate to four of the requests that were limited geographically, as we stated in our letter.

Those are transactions -- so those are requests calling for wire transfer data about transactions involving VR Capital, which is an investor in P&ID, as well as Lismore Capital, which is another investor in P&ID.

But these transactions are being used at this very moment by Nigeria in its case against P&ID in the UK. And --

THE COURT: I understand that.

(Indiscernible crosstalk)

THE COURT: I think you answered my question. My question was actually quite narrow, and that is, so this is actually just wire transfer information showing the transfer of funds?

MR. KLAZEN: Yes. That's correct, your Honor.

THE COURT: Okay. And how was the request phrased that prompted the production of the wire transfer information?

MR. KLAZEN: So, your Honor, this is at document 3-3, was one of the exhibits that Nigeria filed with its application. And I'm referring to Exhibit 3 because that is the subpoena directed at HSBC. But the language is essentially identical for each of the subpoenas directed at the ten different banks. But I will use this one as an example.

So there are requests numbered 4 through 7 in that subpoena. And I will just take the first one by way of example. It states that it seeks all documents concerning any transactions between Lismore Capital Limited and any person or entity in Nigeria. And it is the last phrase there, "any person or entity in Nigeria," that is the limitation, the geographic limitation that we referenced in our letter, your Honor. I'm not saying limitation appears in each of the four requests, 4 through 7 in each of the ten subpoenas.

THE COURT: I understand now. I understand your out-of-scope argument.

I guess what I was getting at is so this was not a request for P&ID account information specifically; it was a request for other information with a geographic limitation. And you're objecting to the fact that the geographic limitation wasn't adhered to.

MR. KLAZEN: Yes, your Honor. We don't know how it is

that Nigeria obtained that information. We first learned about it because your Honor had granted our client's request to obtain copies of whatever productions Nigeria obtained. That was part of your Honor's order. And then we saw that there were approximately 400 transactions in the P&ID -- sorry, in the HSBC production that were transactions that had no connection to Nigeria.

And this is not just a hypothetical concern about, oh, they obtained more documents than they should have; but, in fact, Nigeria has been using some of that very discovery against P&ID in the English proceedings, claiming that these transactions supposedly show wrongdoing by our client and its alleged associates.

THE COURT: So let me just interrupt.

It sounds like, based on what I read, there isn't any dispute that the production was broader than was called for. And so the government of Nigeria now has documents that are beyond the scope of the subpoena.

But can you cite me any law that gives you -- meaning your client -- the authority or standing, or call it what you want, to ask for release from that?

MR. KLAZEN: I will, your Honor. I would cite your Honor to the general proposition that, as an interested party, our client has the ability to intervene or participate in these proceedings, raise objections to the 1782 application, for

example, and request that your Honor fashion an appropriate protective order. So that's essentially -- I don't know whether this precise circumstance has occurred in other cases, and certainly that's something that I could look for. But I think the main point here is that because this is --

THE COURT: Let me just interrupt there.

The fact is you haven't cited any other cases. And I presume -- I mean, you're a good lawyer from a good law firm. I assume that's something that you looked for when you made the current application. Is that right?

MR. KLAZEN: Well, actually, not, your Honor. Because we wrote a letter to your Honor, according to your practices, which is essentially a premotion letter. And so we did not cite any case law, not because --

(Indiscernible crosstalk)

THE COURT: My individual rule asks for citation to case law. But what I hear you saying is that you would like some time to see if there's any law that you can present; is that right?

MR. KLAZEN: If that's something that your Honor is interested in seeing, then we would appreciate that, your Honor.

THE COURT: Yes, I would.

MR. KLAZEN: As I said, I think the case law on what constitutes an interested party in 1782 proceedings makes

exactly the point that if the evidence sought is to be used against somebody who is not necessarily the applicant or the discovery target, and that party has standing to participate in the 1782 to raise objections, and we think that includes asking for a protective order which, of course, the Court has very broad discretion in fashioning.

THE COURT: Okay. Thank you.

Let me hear from Mr. Major.

MR. MAJOR: Thank you, your Honor.

Just in response to the last issue that we were discussing -- and again, just for the court reporter, this is Chris Major on behalf of the applicants.

One of the applicants is Attorney General Malami, who's the chief law enforcement officer of Nigeria. He has received documents from the banks, including HSBC. He can't turn a blind eye to the fact that there are documents that have been produced to him that are relevant.

We didn't obviously get a chance to preview HSBC's production. We didn't preside over HSBC's document collection. But the fact of the matter is the attorney general has received documents which are relevant to his ongoing investigations and prosecutions. And therefore, we obviously can't agree to release relevant information that he needs for his ongoing investigation.

What we did agree to do at considerable time and

expense is to conduct a meet-and-confer process with P&ID. And we agreed to go through each one of the transactions that they had flagged. And we were in the process of working our way through that -- we had been requesting information to help us get through the last bundle of them -- and the meet-and-confer was abandoned by P&ID. And they filed the letter which cites no basis for what's really an extraordinary ask on behalf of -- by P&ID, which is not that there is something that was privileged that needs to be clawed back, which, of course, we would abide by, but that the documents that were produced went beyond P&ID's reading of the subpoena.

It's an extraordinary thing --

THE COURT: Is there any dispute that the documents are actually and not subjectively, but actually and objectively beyond the reach of the subpoena?

MR. MAJOR: Well, your Honor, I don't know that they are beyond the reach of the subpoena. I think that they are broader than the request that counsel read over the telephone today.

As Mr. Klazen pointed out, VR Advisory is an investor in P&ID and, in fact, is controlling P&ID as best as we can tell. Because 100 percent of P&ID has been sold, we're told, some time in 2017. I don't know the particulars. And there are requests about all transactions relating to P&ID. And some of these transactions appear to be connected with the

investment that VR Advisory made in P&ID, which essentially was an acquisition of the award, because P&ID does nothing other than attempting to enforce this award and procuring the GSPA, which is the underlying agreement which Nigeria maintains was procured through fraud and bribery.

And among the documents, there are payments to the daughter of the legal director, Grace Tiger, who presided over the review of the GSPA originally. And there was a payment to her daughter about 11 days before she signed off on the ministry of petroleum signing this fraudulent agreement. So that type of information I think is right within what we were seeking in terms of discovery under Section 1782.

THE COURT: Let me ask you the same question I asked Mr. Klazen: Do you know of any cases or any law which supports your position, in other words, which says that this is unprecedented, and that P&ID doesn't really have standing or authority to make this application once the documents have been produced and the subpoena has been satisfied?

MR. MAJOR: So first, in the federal rules -- and the federal rules, as P&ID pointed out in its initial intervention pleading in this proceeding, the federal rules govern the discovery here. And there are no restrictions in -- it was in the federal rules, and there's nothing in there that would require the receiving party of a document production to comb through the document production and see if there are any

documents that are outside a reading of or a construction of the document requests in whether it be a document request or document request appended to a subpoena.

So I think the federal rules is the place to start.

And then just in terms of --

THE COURT: Let me just ask a question, sort of a hypothetical question. If this came up in an ordinary civil litigation, and there were -- and there was a request for documents, say, between the parties to the litigation, but the documents concerned one of the parties' transactions with somebody else, would that somebody else have the ability to come in and challenge that? I guess, as I think about it, sometimes third parties come in and ask for protective orders in the sense of confidentiality orders. But I'm interested in your view on that.

MR. MAJOR: Sure.

So I think what would happen, the way that that would happen in an ordinary case is if the producing party is under a confidentiality agreement with this third party, and a lot of times those types of NDAs and confidentiality agreements will have a provision that says, If you are asked pursuant to a lawful request to produce, let's say, a copy of this agreement we're entering into, you have to give me three or five or seven days' notice so I can come in and challenge the production.

So in that instance, let's say that party A in the

lawsuit is asked to produce this confidential agreement. It goes to the third party. It says, I've been asked to produce it; I'm required by the rules to produce it. If you want to take some step, go ahead. And then that party would have to intervene in the case and, as your Honor said, ask for a protective order.

Now, here, we're not at all saying that we won't undertake any efforts here. We've already undertaken an extra effort. And we are willing to give or to delete, essentially -- we're talking about a spreadsheet, your Honor, which lists transactions, of deleting the transactions that P&ID is concerned about, which, we were told, were comprised of intercompany transfers among VR Advisory and affiliates, and also payments from VR Advisory or its affiliates to employees of VR.

And we were not given -- they wouldn't tell us, you know, which ones were which or anything like that. So what we undertook was looking at each of the transactions and doing open-source research to see, okay, it went to person A. Did person A ever work at VR Advisory. If we could determine that on an open-source basis, we said, Okay, that looks like a payment from VR to an employee.

And those are, as we point out in the letter, the more than 200, based on our own research, that we are willing to delete. And we were, have been, and remain willing to continue

meeting and conferring with P&ID's lawyers to get information about the now hundred and some-odd that remain --

THE COURT: I thought you said it was 148 or something like that remaining.

So let me just interrupt and ask Mr. Klazen. Mr. Klazen, you obviously decided on behalf of your client not to pursue any further meet-and-confer. And do you want to just talk about that a little bit?

MR. KLAZEN: Sure, your Honor.

Well, first of all, I think -- because your Honor asked for relevant case law, I think I would point your Honor to the *Accent Delight* case, which opposing counsel actually cited in its letter, which is a Second Circuit decision from 2017. And that was a situation where the Second Circuit made it very clear that the court has authority to fashion appropriate protective orders, including in situations where essentially the applicant in the 1782 says that it intends to use discovery for one thing, but then actually uses it for another foreign litigation.

And that case, by the way, also involved -- while I think the request for a protective order was made by a party, there was an intervenor in that case as well that was involved in that case and had raised an opposition to the 1782 and was also involved in the protective order discussions.

So I think that really just goes to show that in the

1782 context, an interested party has an interest in this. Because in the UK, where Nigeria is now using this discovery, contrary to what it told this Court, P&ID is the opposing party. So it's not just a situation where we are some outside party that has a concern. We are actually the respondent on Nigeria's application in the UK, where it is using this very discovery. And so in that sense I think it's a little bit of a different situation than in your normal U.S. discovery context.

The second point I would make, your Honor, is that Nigeria is now essentially trying to negotiate with the Court and with us, you know, what specific transactions it should be able to use or not be able to use. And we don't think that's really the issue here.

Our concern is that Nigeria came to this Court and didn't follow the proper process in that it sought authorization for certain discovery based on the application. And it was based on that application that we and other interested parties made decisions about whether to oppose the application or not oppose the application.

And then based on that, your Honor made the decision to grant the request. And as your Honor may recall, P&ID actually did not oppose the 1782 application in the form in which it had been filed. And that was a deliberate decision.

But if Nigeria had made a different application where it had said what it intended to do with the discovery, and

perhaps sought broader discovery than it actually put in the subpoenas, our client probably would have taken a different position in responding, and perhaps other interested parties, because I think there are about 30 or so in this case who did not appear in the proceeding --

(Indiscernible crosstalk)

THE COURT: Often, confidentiality agreements are agreements; they are not just orders by the court. And it sounds like you were engaged in the process of negotiating what is tantamount to a protective order --

MR. KLAZEN: I can speak to that, your Honor.

THE COURT: -- but at some point decided to abandon the effort. And my question is what was your thinking there?

MR. KLAZEN: Sure.

Well, the word "abandoned," of course, is one that's chosen by Nigeria and used in its letter. I don't think that's a proper characterization.

What we requested when we first contacted opposing counsel, once we had noticed from the production -- from the HSBC production that there were these out-of-scope wire transfers, is that we requested that they not use them, that Nigeria not use them, and destroy them, you know, essentially a clawback, if you will.

And the position as initially, sort of, it tentatively stated, and then later in the subsequent meet-and-confer,

confirmed by opposing counsel is that Nigeria would not agree with that; and that they would not do that. And that instead, their preferred approach was one where our client -- or where we would discuss -- would have to discuss with them which of the out-of-scope wire transfers were relevant to Nigeria's investigation.

First of all, that is impractical; but it essentially puts the burden on us and our client to somehow prove to Nigeria's satisfaction that certain transactions are not relevant. And this is actually stated in the letter that Mr. Major filed on the third page. And I'll read it from here and the first full paragraph. It states: Instead, P&ID should demonstrate that the transactions are not connected with the fraud FRN is investigating before seeking the extraordinary relief to which it would otherwise not be entitled.

So Nigeria's position is that now that it has obtained wire transfers that are outside of the scope of the subpoenas that your Honor approved, that the burden is on our client to demonstrate that the transactions are somehow not relevant to Nigeria's investigation.

It's very unlikely that any agreement would be reached on that in any event, because Nigeria takes a very expansive view of its investigation. But we are not asking your Honor to rule on whether their investigation is proper or not.

I think the point is that they asked for specific

discovery, as stated in the subpoenas, and somehow obtained discovery that went beyond that. And our position is that they should not be able to use it, and they should have come back to the Court if they wanted to get more discovery than they were originally seeking. And decisions were made at the time based on the application and based on the proposed subpoenas as they were filed with the Court. Decisions were made by our client and potentially other interested parties as to what position they were going to take. And they didn't follow the right process.

THE COURT: Let me just ask a question. Let's leave the UK arbitration aside for the moment.

Let's assume for purposes of this discussion that documents were produced that were beyond the scope of the subpoena, but that are relevant to the criminal investigation and they could make an application for those documents.

What is your objection to those documents being produced?

MR. KLAZEN: Well, our objection is, I would say, two things: First of all, that they are seeking -- that they involve things that we believe are not connected to any wrongdoing by our client. And so we are concerned, as has been now actually evidenced by Nigeria's actions, that they are taking material outside the scope and using it to malign our client in foreign proceedings. So that's a concern that we

have.

And other interested parties -- and obviously I am limited as to what I can say about discussions that were had with our client and so forth. But other interested parties have looked at the application and the way that it was filed, and decisions were made about what positions to take.

And so I think this is, in that sense -- you know, what Nigeria is now trying to do is to turn this into a discussion about relevance after the fact, when their requests were approved in a particular way, and our client and others made decisions about how to respond to that at the time.

So we don't think that this is the proper way to now try to broaden the scope of their discovery requests by doing that now, after the fact, and putting the onus on us to prove that somehow they are not relevant to Nigeria's investigation, which is incredibly broad --

(Indiscernible crosstalk)

THE COURT: Okay. I understand your argument. And I think you've made your point.

Can I hear briefly from Mr. Major, and then I'll either rule or reserve.

MR. MAJOR: Yes, your Honor. Thank you.

This is Chris Major, on behalf of the applicants.

What P&ID just said is just not true. Suggesting that they would have taken a different tact or they seem to be

suggesting that others may have, there's no evidence of that before the Court.

What there is is contrary evidence, which is JPMorgan Chase did seek use restrictions from us in the form of a stipulated protective order which is pending before the Court. And there is an agreed use restriction on what the applicants can do with the documents produced by JPMorgan Chase, which does address other proceedings. And essentially, JPMorgan Chase wanted to make sure that the documents would not be used in any proceeding in which JPMorgan Chase is a party.

So JPMorgan Chase was well aware of Second Circuit law. They knew that the documents, once produced to A.G. Malami and the Federal Republic of Nigeria could be used in other proceedings. And they sought and obtained from us -- and it's subject, of course, to the Court approving it -- a limited use restriction.

The suggestion that counsel just made that parties sat back because of what was presented in the papers, it's just not true. And the same goes for P&ID, which argued in its initial intervention pleading that the applicants should not be able to use the documents in other foreign proceedings. We opposed that in our reply, and then the Court issued an order not granting P&ID that relief.

So the efforts that are now being undertaken again were, in fact, aware to the parties at the time that the

application was filed and --

THE COURT: Well, there really are two issues here, and each of you is talking about a different one.

One is the issue of use in this arbitration proceeding; and the other is the overproduction or the beyond-the-scope production. I understand that we may be talking about the same documents, but they really are two different issues.

So if you could just address the other issue, which is the beyond-the-scope document issue.

MR. MAJOR: Yes, your Honor.

And I think that the documents are certainly within the scope of the subpoena and absolutely within the scope of the discovery we described that we were seeking.

The federal rules are what apply here.

Even if the documents were found to be beyond the scope of requests in the subpoena, we would have other options available to us, such as serving a supplemental subpoena or amending the subpoena to obtain the documents. The relevance, at the end of the day, is the key issue.

And the hyper-technical reading of the subpoena doesn't solve P&ID's issue, which is A.G. Malami, through these efforts under Section 1782, is finding evidence supportive of the fraud, that the fraud occurred. And that's at the heart of what P&ID is trying to do, is prevent and obstruct the

investigation.

We remain willing to work through the 148 transactions and gain some comfort that some or all of them may be not relevant. Just being beyond the scope of the written request --

THE COURT: So the point that Mr. Klazen made, which is somehow that burden is being put on them to determine relevance, and they are not really in a position to do that, are you saying that you'd be willing to meet and confer and, based on factual explanations, make your own determination of relevance and then go from there?

MR. MAJOR: Yes. We need further information at this point about those 148 transactions. And we can meet and confer and gain further information, and then hopefully reach agreement on all of them, whether they are relevant or irrelevant. And I think that would substantially narrow that issue.

THE COURT: Okay. So here is what I would like to do --

MR. KLAZEN: Your Honor, may I respond?

THE COURT: No, I'm going to rule now, just because I've heard from you both a lot, and I plan to propose that I hear a little bit more. So let me just tell you what I think we should do.

So what I would like is for you to meet and confer

again, with the understanding that any relevance determination -- because it sounds like that's what we're talking about, any relevance determination be made by Nigeria and not P&ID; and that you address yourself to whatever documents are in dispute; and that you report that to me by -- let's say by the 15th, which is Wednesday of next week. And so it's just under a week.

And then to the extent that there are any remaining disputes, if you could get me simultaneous letters on that, let's say by the 21st, and then I will endeavor to rule based on that and only as to what remains in dispute. Okay?

I'll put that in a written order.

But I think it was useful for you to hear each other's positions, but also very useful for me to hear what you have to say. So I look forward to hearing that you've resolved, I hope, some good part of this, if not all of it.

MR. KLAZEN: Your Honor, thank you.

May I ask one question?

THE COURT: Yes. Who's speaking please?

MR. KLAZEN: Yes. Sorry.

This is Joseph Klazen, for P&ID.

THE COURT: Yes.

MR. KLAZEN: Your Honor mentioned that there were -- and they've correctly noted that there are essentially two issues: One is the overbroad discovery, and the other is the

use of the discovery in proceedings that were not disclosed in the application.

And so is that an issue then that, if that is not resolved, we should also report to you on by the 21st? Is that what your Honor contemplates?

THE COURT: Whatever your remaining issues are, although -- I mean I think on the issue of use in other proceedings, you pretty much have addressed that in your letters. And you don't have to repeat anything that's in your letters, the ones that you've already sent me. You can just say you're incorporating those arguments by reference. I will undoubtedly look at them again closely. So this is just a supplemental submission; don't make it repetitive.

And I'll also put a page limit on it. Let's just say that it's going to be limited to four pages. And they should be letter submissions. Okay?

MR. KLAZEN: Thank you, your Honor.

THE COURT: All right. Thank you.

We're adjourned.

I'll issue an order so this is clear.

MR. KLAZEN: Thank you, your Honor.

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